No. 83-1559

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

ROBERT M. AYRES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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35 pp

Questions Presented.

1. Whether the court below failed to properly apply the principles and standards expressed by this Court in *Brown* v. *Illinois*, 422 U.S. 590 (1975) and *Westover* v. *United States*, 384 U.S. 436 (1966) in concluding that the provision of *Miranda* warnings shortly after an unconstitutional interrogation, a change of custodial location and the passage of a short amount of time, and the involvement of additional law enforcement officers were, alone, sufficient to vitiate the taint arising from a prior violation of petitioner's constitutional rights?

2. Whether, given the well established constitutional proscription of arrest based on presence and association, the court below erred in concluding that petitioner's presence on a speedboat first seen heading out to sea in an area where boats were not unusual and later seen returning to shore at high speed from the vicinity of a sailboat found to contain marijuana were facts sufficient to establish probable cause for petitioner's arrest?

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CONSTITUTIONAL PROVISIONS.

No. - .

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UNITED STATES OF AMERICA,
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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Robert M. Ayres petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on January 19, 1984.

Opinions Below.

Petitioner was arrested on the Rhode Island shore on August 9, 1982, when the truck in which he was riding was stopped shortly after the seizure of a quantity of marijuana on the sailboat "Fiesta" a few miles offshore (A. 12a-13a). He was subsequently charged with various violations of 21 U.S.C. § 801 et seq.*

Prior to trial Ayres moved to suppress the fruits of his arrest, including statements made at that time and within the following two hours. He contended first, that he was arrested without probable cause and that the statements were the tainted product of his unlawful arrest and, second, that his initial statements were involuntary and that the subsequent statements were the unattenuated product of those involuntary statements. The United States District Court for the District of Rhode Island found that petitioner's arrest was based on probable cause in an oral opinion rendered on November 3, 1982. This opinion is reproduced in the appendix at A. 1a-6a. In an oral opinion rendered on November 9, 1982, the district court held that petitioner's initial statements were inadmissible because they were not voluntarily made but that the subsequent statements, made after renewed provision of *Miranda* warnings,** were admissible. This opinion is reproduced in the appendix at A. 6a-9a. The United States Court of Appeals for the First Circuit affirmed the decisions of the district court on January 19, 1984. The opinion, not yet officially reported, is reproduced in the appendix at A. 10a-22a.

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* Ayres and two others were charged with conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana. Ayres was also charged with attempting to possess with intent to distribute marijuana and possession of marijuana. He was convicted of conspiracy to possess with intent to distribute marijuana and found not guilty of all other charges. He was sentenced to a six year term of imprisonment (A. 11a).

** See, *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Jurisdiction.

The judgment of the Court of Appeals was entered on January 19, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Statement of the Case.

On the evening of August 9, 1982, acting pursuant to previously received information, the Coast Guard intercepted the sailing vessel "Fiesta" and its cargo of marijuana one to two miles off the Rhode Island coast and arrested the two men on board. The Coast Guard relayed this information to a team of federal Drug Enforcement Administration agents and Rhode Island law enforcement personnel who had been deployed along the coast (A. 12a).

Approximately one hour earlier, officers on the shore had seen a white speedboat with two persons aboard head out to sea. The boat was not unusual; nor was it unusual to see such boats in that area. After the "Fiesta" was illuminated by the Coast Guard one officer on the shore saw a speedboat, which he described as being in the vicinity of the "Fiesta", heading back to shore traveling at what he perceived as a high rate of speed and without running lights.* The speedboat proceeded along the shore into the Quonochontaug breachway, where it was loaded onto a trailer pulled by a truck (A. 1a, 5a, 12a-13a).

Based on the observations of the speedboat and the information from the boarding party, the officer in charge of the shore operation gave orders to arrest the occupants of the speedboat. As the boat was being towed off the breachway, two officers pulled their car in front of the truck and blocked its path. The agents got out of their car; the driver of the truck fled. Petitioner, seated in the passenger seat of the truck did not flee. He was ordered out of the truck by an officer holding a loaded CAR 15 rifle; he complied. He was then ordered to lay face down in the dirt; he did so. The officer then handcuffed him

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* The speedboat was not the type of boat the Coast Guard had received information would be used to offload the "Fiesta". Nor had the Coast Guard officers on the boarding vessel seen any small boats in the vicinity of the "Fiesta".

behind his back and, standing over him with the rifle, gave him his *Miranda* warnings. Responding to questioning at that time, petitioner made incriminating statements. These statements were subsequently excluded by the trial court as involuntary. See, A. 6a-7a, 13a.

Approximately ten minutes later petitioner was placed in a police cruiser and transported to the station. He was given *Miranda* warnings in the cruiser and again in the holding cell. With two of the officers involved in the questioning at the breachway present at the station, petitioner was questioned again and made further incriminating statements, both shortly after his arrival at the station and around an hour later. Notwithstanding the continual custody and the short amount of time between the breachway statements and the station-house statements — the absence of intervening circumstances, the subsequent statements were held admissible. See, A. 6a-9a, 16a-17a.

Reasons Why the Writ Should be Granted.

A. The Decision to Admit Statements Made by Petitioner Subsequent to Unlawfully Obtained Statements Improperly Applies the Principles and Standards Established by This Court in a Number of Decisions and Conflicts With the Decisions of Other Courts of Appeals.

The courts below recognized that petitioner's initial statements at the breachway were involuntary and, therefore, inadmissible. Indeed, as the trial court stated, under the circumstances in which the statements at the breachway were made — in response to questioning conducted after *Miranda* warnings provided while petitioner was face down in the dirt,

handcuffed, with a rifle held over him — "it is ridiculous to contend that the defendant has made a knowing and voluntary waiver of his rights" (A. 6a). Nonetheless, the courts below held that the subsequent provision of *Miranda* warnings and the fact that subsequent questioning occurred at a different place in a different atmosphere rendered the later statements admissible (A. 6a-9a, 16a-17a).

Petitioner submits that the decisions below fail to properly apply the principles and standards set forth by this Court in *Westover* v. *United States*, 384 U.S. 436 (1966); *Clewis* v. *United States*, 386 U.S. 707 (1967); and *Brown* v. *Illinois*, 422 U.S. 590 (1975). In those cases this Court recognized that statements of a defendant may be inadmissible notwithstanding the provision of adequate *Miranda* warnings if those post-warning statements were tainted by prior, unlawfully obtained statements. A mere change in location or the passage of a short amount of time, or interrogation by a different officer are not factors sufficient, in and of themselves, to vitiate the taint from prior unlawfully obtained statements. The theme of this Court's decisions has been that statements made subsequent to unlawfully obtained statements must be clearly separated from and unaffected by the circumstances surrounding the earlier statements before they can be found to be admissible. It is the connection between the initial statements and the subsequent statements that must be examined — a connection which may remain intact despite the passage of time and/or a change in location or officers involved in the interrogation. Yet, here, focusing essentially on the change in place and involvement of other officers, the decision below ignores the totality of the circumstances — the continual custody, the short time between the initial statements and the subsequent statements, the absence of an attorney.

In so doing, the decision below also conflicts with the decisions of other Courts of Appeals which have properly applied

this Court's decisions to hold that statements obtained in analogous situations were the tainted product of prior, unlawfully obtained statements. See, e.g., *Stumes* v. *Solem*, 671 F.2d 1150 (8th Cir. 1983), cert. granted on other issue, sub nom. *Solem* v. *Stumes*, 103 S.Ct. 3568 (1983); *United States* v. *Tucker*, 610 F.2d 1007 (2nd Cir. 1979); *United States* v. *Lee*, 699 F.2d 466 (9th Cir. 1982); *Alberti* v. *Estelle*, 524 F.2d 1265 (5th Cir. 1975); *Randall* v. *Estelle*, 492 F.2d 118 (5th Cir. 1974).

Here, as in the cases above, there was no attenuation of the primary taint arising from the illegally obtained statements at the site of defendant's arrest to justify admission of his subsequent statements. The mere provision of *Miranda* warnings within ½ hour of the unlawful interrogation was simply insufficient. There were no other intervening circumstances. Petitioner remained in custody throughout the subsequent interrogations which occurred within 1 to 1½ hours of the first. He did not consult with an attorney or anyone else during that period. The subsequent interrogation involved some of the same officers present at his initial statement. In sum, there was simply no break in the stream of events between his first and subsequent statements; the causal relationship fatally tainted the latter, requiring their suppression.

Accordingly certiorari should be granted to resolve the conflict between the decision below and the decisions of other Courts of Appeals and to clarify the principles and standards to be applied in determining the admissibility of statements made subsequent to a statement obtained in derogation of a defendant's constitutional rights.

B. Arrest on the Basis of Suspicious Association Violates the Fundamental Constitutional Standards Long Recognized by This Court.

As the opinions below demonstrate, petitioner was arrested because he was in a truck towing a speedboat which had been

seen in the area of a sailboat found to contain marijuana and had returned to shore at a high rate of speed after the Coast Guard had illuminated the sailboat (A. 5a, 12a-13a). The officers observed no direct contact or transfers between the speedboat and the sailboat. The speedboat did not appear to be heavily loaded. It was not an unusual boat for the area in which it was observed. Nor was it the type of boat officers had been advised would be used to offload the marijuana from the sailboat.

Petitioner submits that in upholding his arrest on these facts the opinions below conflict with the fundamental principles recognized by this Court in *United States* v. *DiRe*, 332 U.S. 581 (1948) and *Sibron* v. *New York*, 392 U.S. 40 (1968) and reiterated in their numerous progeny. Arrests predicated on presence at the scene of a crime and/or association with criminals alone are constitutionally proscribed; the Fourth Amendment requires more than suspicious association. Indeed, numerous decisions have held that circumstances more suspicious than those here were insufficient to establish the requisite probable cause to arrest. See, e.g., *United States* v. *Everroad*, 704 F.2d 403 (8th Cir. 1983) (holding that facts that defendant accompanied a person known to agents to be involved in a drug transaction to areas where the deal was being arranged, that the agent was to receive additional drugs within ½-hour of the first transaction, and that defendant's motel was within a ½-hour radius of the place where the first transaction occurred, were insufficient to establish probable cause for defendant's arrest); *United States* v. *Ceballos*, 654 F.2d 177 (2nd Cir. 1981) (facts that defendant entered the three-family house in which a co-defendant believed to be trafficking in drugs lived, left 5 to 10 minutes later carrying a paper bag, looked up and down the street in a curious manner, and was Hispanic (observations fitting the alleged profile of the co-defendant's customers) held insufficient to establish probable

cause for arrest). *See also*, *United States* v. *Bergdoll*, 412 F.Supp. 1323 (D. Del. 1976); *United States* v. *Strickler*, 490 F.2d 378 (9th Cir. 1974); *United States* v. *Jennings*, 468 F.2d 111 (9th Cir. 1972); *United States* v. *Shavers*, 524 F.2d 1094 (8th Cir. 1975); *United States* v. *Short*, 570 F.2d 1051 (D.C. Cir. 1978); *United States* v. *Bazinet*, 462 F.2d 982 (8th Cir. 1972); and *United States* v. *Gonzalez*, 362 F.2d 415 (S.D. N.Y. 1973) for other cases in which courts have refused to find probable cause to arrest on facts of presence and association more compelling than those present here.

If petitioner was arrested without probable cause, any statements made subsequent to his illegal arrest on the breachway and at the police station where he was taken shortly after his arrest should have been suppressed as the unattenuated tainted product of that initial illegality, pursuant to the proper application of the principles and standards set forth in *Brown* v. *Illinois*, *supra*; *Dunaway* v. *New York*, 442 U.S. 200 (1979); and *Taylor* v. *Alabama*, 102 S.Ct. 2664 (1982).

Accordingly, certiorari should be granted to correct the plainly erroneous decision below and reaffirm the vitality of the constitutional principles set forth in *United States* v. *DiRe*, *supra*, and *Sibron* v. *New York*, *supra* and their progeny.

Conclusion.

For all the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

Ruling of the United States District Court for the District of Rhode Island Concerning Motion to Suppress, November 3, 1982

The Court: First, I apologize if this ruling of mine comes out in a rather jaggered fashion than the normal smooth flow of an opinion in which we took time to write up, but it covers all the bases that I think are important, and so I'll go ahead.

. . . .

The defendant Ayres has filed a motion to suppress evidence obtained as a result of his allegedly unlawful arrest and the warrantless search of an automobile in which he was a passenger. Ayres also contends that certain statements made by him must be suppressed because they were obtained in violation of Miranda v Arizona.

While the government and the defendants disagreed as to many of the material facts in the case, I will set forth a general outline of the events giving rise to the motions which are presently before me.

On August 9, 1982, Rhode Island Drug Task Force officers obviously received information that a sailing vessel would be carrying marijuana in the area of Weekapaug Point. In the early evening hours of August 9, 1982, crew members of the Coast Guard Cutter Cape Fairweather boarded the Fiesta. Defendants Termini and Ardizzone were aboard that boat.

Lights from either the Cape Fairweather or the Point Jackson, another Coast Guard cutter, illuminated the Fiesta. At this time, agents of the Rhode Island Drug Task Force were positioned on shore. Prior to the illuminating of the Fiesta, agents saw a high speed boat subsequently identified as a Sea Ray craft, placed in the water at Quonochontaug. This was the same boat previously seen by an agent being towed southerly on Route 1.

After boarding the Fiesta, agents from the Cape Fairweather questioned Termini and Ardizzone as to their documentation. During the course of this questioning, Termini said, in effect he did not want any trouble, there was marijuana on board. At about this time another Coast Guard officer who was seated near the hatch smelled marijuana. He shined his flashlight down the hatch and observed numerous bales.

Termini and Ardizzone were placed under arrest, and the Fiesta was towed to Point Judith Coast Guard station. There a customs officer, pursuant to 19 U.S.C. 1581 searched the vessel, which was found to have approximately 221 bales of marijuana weighing approximately 8,785 pounds. The next day the Fiesta was towed to Woods Hole to the United States Coast Guard station there, and at that point a third search was conducted by Lt. Meisner. This revealed an eyeglass case containing a quantity of cocaine.

At Point Judith, these defendants were given their Miranda rights by Officer DiGiovanni, and certain statements were then made.

After observing defendant Ayres and another person who is not a defendant to this action, swiftly load the Sea Ray onto a trailer drawn by a pickup truck, Rhode Island agents stopped the pickup truck. Ayres who was a passenger, was apprehended but the driver fled. A search of the pickup truck resulted in the finding of a small quantity of cocaine and two pounds of marijuana.

During the course of these events, defendants Termini and Ayres allegedly made certain incriminating statements and they claimed the statements should be excluded under Miranda.

. . . .

Now as to Ayres. Defendant Ayres advances three arguments in support of his motion to suppress. He contends the stop of the vehicle in which he was a passenger constituted an

arrest, and was unlawful because it was not based on probable cause. Even if the stop of the vehicle did not constitute an arrest, it was unlawful because it was not based on the specific and articulable facts necessary to justify a warrantless investigatory stop.

And three, certain statements made by him must be suppressed because they were made involuntarily while he was in custody and prior to his receiving the Miranda warnings.

It has been rightfully conceded that Ayres has no standing to suppress evidence seized as a result of the allegedly unlawful search of the truck in which he was a passenger. In Rakus v Illinois, 439 U.S. 128, 1978, the Supreme Court held that passengers in automobiles normally do not have a legitimate expectation of privacy in the glove compartment and under the seat of an automobile. Thus, under Rakus, it would appear that unless Ayres has some interest in the truck other than that of a passenger, he does not have standing to object to a search of that automobile.

Lack of probable cause for the arrest was also argued. The Government argues that there existed a reasonable and articulable suspicion to stop the truck which was towing the suspect Sea Ray and in which defendant Ayres was a passenger.

The defendant contends, however, that the Government must show that there existed probable cause as distinguished from reasonable suspicion for stopping the truck. This is necessary the defendant asserts because the blocking of the truck in which he was riding by an unmarked car, and the approach of plainclothes officers, who exhibited firearms, was so intrusive as to constitute an arrest.

To support his argument that the Government must show that the stop of the truck was supported by probable cause, the defendant relies on United States v Ceballos, 654 F.2d, 177, Second Circuit, 1981. In that case, the Second Circuit held that the blocking of Ceballos' car, and the approach of officers

with guns drawn, constituted an arrest, and thus required a showing of probable cause. The Court reached its conclusion by analyzing the degree of intrusion, the amount of force used and the extent to which appellant's freedom of movement was curtailed.

In light of the facts of this case, I find that the right standard to be applied is that of probable cause. Having found that the government is required to show that there existed probable cause, for the stop and arrest of Ayres, it must be determined whether this standard has been met: Probable cause exists where the facts within the arresting officer's knowledge are sufficient to warrant a prudent man in believing that the petitioner had committed, or was committing, an offense. Beck v Ohio, 379 U.S. 89, at 91, 1964. United States v Chadwick, 532 F.2d, 773 at 784. First Circuit, 1976. Affirmed 433 U.S. 1, 1977.

It is not necessary that the officer possess knowledge of the facts sufficient to establish guilt, but more than mere suspicion is required. United States v Hansen, 652 F.2d 1374, 1383, Second Circuit, 1981.

Deciding whether there existed probable cause for the stop and arrest of Ayres depends upon whether the Coast Guard officers' observations of the Sea Ray are sufficient to establish probable cause that Ayres was about to engage in criminal activity by picking up the marijuana on the Fiesta.

In essence, the defendant contends at trial, as he argued in his brief, the Government's description of the Sea Ray's movements as proceeding to approach the Fiesta, is merely conclusory characterization unsupported by the reports of the Coast Guard officers.

In the defendant's view, the evidence shows only that the Sea Ray was in the general area of the crime, and this fact is not in itself sufficient to establish probable cause.

I conclude that there was probable cause. The facts underlying my conclusion are as developed in the evidence of this case, that this boat, this Sea Ray, was seen being towed on Route 1 in a southerly direction; that the same boat was placed in the water at approximately 7:45 p.m., just prior to the seizure of the Fiesta, and that, as the Marshal testified, he saw this boat travel along the coast and then turn at a 90 degree angle out to sea. Subsequently, he again saw the boat along the shore going at a high rate of speed heading for the breachway, without running lights. This is followed by the fact that it was seen, the boat was being hitched and obviously the man apprehended, who was Ayres, was trying to get away.

Putting these all together, and in their entirety, leads me to no other direction but in that which points to probable cause, and I so find. There was probable cause in arresting Ayres. The arrest not being illegal, it follows, therefore, that counsel's argument resting on Taylor v Alabama, 102 Sup. Court, 2664, 1982, is not applicable.

As to the Miranda warnings, concerning Mr. Ayres, I must say to Mr. Wall, counsel for Mr. Ayres, I find this a troublesome area. My trouble is based on the testimony as I recall the officer himself testified that he had Mr. Ayres on the ground and a gun pointed to his head, at the time that he was giving him Miranda warnings. Though there was a subsequent denial, as the evidence will show, of physical abuse, I feel, therefore, that I cannot rule on this one point at this time, and I reserve counsel the right to raise this issue again at the time of trial.

That is the order of the Court. The defendants' motions are denied in all respect excepting as to that portion which deals with the Miranda warnings concerning Mr. Ayres. The Court makes no ruling on that but will reserve ruling to the time of trial, confined strictly to the statements of the Miranda warning, or especially for further development of the testimony of

the officer who stated, my recollection, that Ayres was on the ground and that he had a gun pointed to his head, and that he had memorized the Miranda warnings, and didn't have to read it to him.

Ruling of the United States District Court for the District of Rhode Island Concerning Motion to Suppress, November 9, 1982

In its prior ruling the Court excluded only those statements made by defendant Ayres after receiving his Miranda rights from Inspector Phelps, but before receiving them for a second time from Sergeant Wilkicki. The government argues that Phelps' testimony that he was armed with a semi automatic rifle which was pointed at the defendant Ayres as he was read his Miranda rights fails to demonstrate that the statements were coerced. Of course, the subsequent testimony as we know now was that the gun was held at a, what did he call it?

Mr. Wilson: Port of call.

Mr. Wall: Port arms.

The Court: Port arms, right. The government, however, simply cannot accept the government's characterization of the facts in this case or its conclusion that Phelps would have been foolhardy to stand before Ayres unarmed reading a Miranda warning. Ayres was handcuffed and lying with his face in the dirt, at the time his Miranda rights were read to him by Inspector Phelps. It is difficult to imagine any plausible reason for holding a rifle even in the port arms position, and reading him his Miranda rights after the suspect had already been handcuffed. In these circumstances the Court believes, it is ridiculous to contend that the defendant Ayres made a knowing and voluntary waiver of his rights. Accordingly, the Court must reject the government's objection to the exclusion

of the statements made by defendant Ayres after receiving his Miranda rights from Inspector Phelps, but before receiving them from Sergeant Wilkicki. . . .

Finally, the Court must consider whether the statement made by defendant Ayres after receiving his Miranda rights from Sergeant Wilkicki should be excluded. The Court left this question open in its prior ruling and now has received a memorandum from defendant Ayres arguing that the second provision of Miranda warnings is insufficient to vitiate the taint arising from the initial illegality so as to render the subsequent statements inadmissible. The Court rejects defendant Ayres' argument that the statements made by him subsequent to him being given his Miranda warnings by Sergeant Wilkicki must be suppressed. None of the cases cited by the defendants support his argument that Ayres' subsequent statements are the tainted product of the initial illegality. Defendant's reliance on *Westover* v. *U.S.*, 384 U.S. 436, 1966 is misplaced. In *Westover* defendant had been in custody for over fourteen hours and had been interrogated at length during that period before confessing. Here, Ayres was in custody for a much shorter period and had been removed in time and place from the place where his constitutionally defective Miranda warnings had been given him. Indeed, the Supreme Court acknowledged in *Westover* "a different case would be presented if an accused were taken into custody by the second authority, removed him both time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 384 U.S. at 496. *Clewis* v. *Texas*, 386 U.S. 707, 1967 is also in a posture. In *Clewis*, the defendant was interrogated, "very frequently" during the first five days of his custody. During this time he had had very little sleep, very little food, and appeared to the police to be sick, 386 United States at 709. Five days later the defendant made an oral confession prior to being advised of his rights to have

an appointed attorney. The Supreme Court refused to admit a subsequent written confession on the ground that the defendant's third confession could not, "be separated from the circumstances surrounding the two earlier confessions". In this case there is no evidence that Ayres was interrogated at length prior to his being provided constitutionally acceptable Miranda warnings. Ayres was provided with Miranda warnings by Sergeant Wilkicki prior to his interrogation in the Charlestown Police Station. This broke the chain of events between his initial involuntary statement and his subsequent admissions in the police station. In *Harney* versus the *United States*, 407 F.2d 586, 5th Circuit, 1969 also is distinguishable from the present case. In *Harney*, the defendant had given one full oral and one full written confession prior to being given proper Miranda warnings. The 5th Circuit concluded that, "when the appellant, reiterated to the F.B.I. agent what he already told twice, and one of those times in writing, the effects of the earlier invalid interrogation and statements had not been sufficiently dissipated and the F.B.I. agent was the direct beneficiary of the illegal conduct of the local police."

This case differs from *Harney* in that Ayres' initial statement, "you are a day early. This is only a surveillance run." is not equivalent to his later admission as to how he allegedly became involved in drug smuggling. Thus, unlike *Harney* this case did not involve the interrogation of the defendant by an agent, "aimed with the defendant's earlier admissions." 407 F.2d 590. It might be argued that the factual information discovered during the interrogation of Ayres, in the Charlestown Police Station was the fruit of the poisonous tree of the earlier unlawful interrogation because both conversations were related to an alleged drug smuggling operation. The Court rejects this contention. It simply cannot be said that Ayres' subsequent statements about his possible involvement with drug smuggling activities were the tainted product of his initial

admission, "the poison, if poison there was, and the circumstances which caused the suppression of the initial statements did not so permiate the later statements that the later must also be suppressed." *U.S.* v. *Monty*, 557 F.2d 899, 903, 1st Circuit 1977. See *U.S.* v. *Gorman*, 355 F.2d 151, 157 1st Circuit, 1965. And so, I rule accordingly.

United States Court of Appeals
For the First Circuit

No. 83-1201

UNITED STATES OF AMERICA,
APPELLEE,

v.

ROBERT M. AYRES,
DEFENDANT, APPELLANT.

No. 83-1215

UNITED STATES OF AMERICA,
APPELLEE,

v.

NICOLO PIRRI ARDIZZONE
AND
FRANK TERMINI,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *Senior U.S. District Judge*]

Before

CAMPBELL, *Chief Judge*,
ROSENN,* *Senior Circuit Judge*,
AND BREYER, *Circuit Judge*.

Judith H. Mizner, with whom *Gail S. Strassfeld*, *Susan P. Sturm*, and *Silverglate, Gertner, Baker & Fine* were on brief, for Robert M. Ayres.

William A. Brown, with whom *Brown & Prince* was on brief, for Nicolo Pirri Ardizzone.

Barry P. Wilson on brief for Frank Termini.

Mervyn Hamburg, Attorney, Department of Justice, with whom *Lincoln C. Almond*, United States Attorney, and *James E. O'Neil*, Assistant United States Attorney, were on brief, for appellee.

January 19, 1984

ROSENN, *Senior Circuit Judge*. The defendants, Frank Termini, Nicolo P. Ardizzone, and Robert M. Ayres, were tried to a jury in the United States District Court for the District of Rhode Island and convicted on drug-related charges[1] arising

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* Of the Third Circuit, sitting by designation.

[1] Termini and Ardizzone were convicted of conspiracy to import, 8,785 pounds of marijuana, in violation of 21 U.S.C. § 963 (1976), conspiracy to possess and distribute the marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(6) (1976 & Supp. V 1981) and 21 U.S.C. § 846 (1976), possession with intent to distribute the marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(6) (1976 & Supp. V 1981) and 18 U.S.C. § 2 (1976), and possession of six grams of cocaine, in violation of 21 U.S.C. § 844(a) (1976) and 18 U.S.C. § 2 (1976).

Ayres was convicted of conspiracy to possess and distribute the marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(6) (1976 & Supp. V 1981) and 21 U.S.C. § 846 (1976).

out of the smuggling of 8,785 pounds of marijuana. Following the imposition of sentence, each of the defendants appealed. We affirm.

I.

In the summer of 1982, the Coast Guard received information relating to the smuggling of marijuana off the shore of Rhode Island. From late July through early August of 1982, the Coast Guard had the sailing vessel *Fiesta* under surveillance. On the evening of August 9, 1982, the Coast Guard moved to intercept it when it was one to two miles off Watch Hill, Rhode Island. The Coast Guard was assisted on land by the Drug Enforcement Agency's (DEA) Rhode Island Task Force. At 8:27 P.M., the Coast Guard boarded the *Fiesta*. They found two men, defendants Termini and Ardizzone, on board. The leader of the boarding party, Chief Petty Officer Gibson, ascertained upon inquiry that the vessel had no registration documents aboard. One officer smelled marijuana and observed numerous bales on the space below deck that he believed contained marijuana. The vessel contained 221 bales of marijuana weighing 8,785 pounds. The officers also found navigational charts suggesting that the boat had traveled outside United States territorial waters.

In the meantime, the task force took positions onshore to apprehend the intended recipients of the marijuana. At approximately 7:25 P.M., state officers Phelps and DiCarlo observed a truck, which was towing a white speedboat[2] about thirty feet in length on a trailer, turn onto the Quonochontaug Breachway. Federal agents met the state officers, passed along information received from the Coast Guard, and gave surveillance assignments. They assigned Phelps to the breachway area

[2] The Government asserts that the speedboat was a type frequently used in illegal drug-landing operations.

where he observed the truck and the trailer that he had seen earlier. The speedboat was no longer there. From his observation point, agent Furtado saw the speedboat go out to sea between 7:45 and 8:00 P.M. The agents communicated their observations to each other by radio.

A half hour later, a coast guard cutter illuminated the *Fiesta* now less than two miles from shore. Within seconds, agent Furtado, who had been observing the *Fiesta* through binoculars, saw the speedboat turn and head directly back to shore. He saw it travel along the coast at a high rate of speed without using its running lights and ultimately enter the Quonochontaug Breachway. Phelps and DiCarlo left their positions and headed for the beach. By the time they reached it, the speedboat had already been lifted from the water to the trailer and the truck was departing. The officers blocked the truck's path. The truck driver opened the cab door and fled, pursued by DiCarlo. Phelps ordered the passenger, defendant Ayres, to lie face down on the ground. Phelps handcuffed him, stood over him with a rifle, and gave him his *Miranda* warnings. In response to questioning by Phelps, Ayres made incriminating statements. Other agents arrived at the scene and searched the truck. They found two bags of marijuana in a storage area behind the driver's seat and a small vial of cocaine in a pocket of the truck on the driver's side. The speedboat contained a box of tools. Phelps turned Ayres over to the Charlestown Police Department.

On the way to the Charlestown police station, Ayres was again advised of his rights. At the station, Ayres was placed in a holding cell and once more administered *Miranda* warnings. Deputy Marshal Thomas then questioned Ayres and Ayres made further incriminating statements. Thomas testified that Ayres told him that he was involved in a smuggling operation. Ayres also stated that he left his house that night to meet the boat. Defendants Termini and Ardizzone also made state-

ments subsequent to their arrest and receipt of *Miranda* warnings. Termini admitted that he was engaged in a smuggling operation.

On appeal, the defendants raise a number of issues, the principal one relating to the failure of the trial judge to suppress statements made by defendant Ayres at the Charlestown police station. The other issues relate to evidentiary rulings by the trial judge, alleged violations of his sequestration order, and the denial of defendants' motion for mistrial based on the jury's view of defendants Termini and Ardizzone in handcuffs while in the custody of marshals.

II.

Ayres argues that the trial court should have suppressed his statements in which he admitted involvement in the smuggling operation. At trial, the court did order that testimony about incriminating statements made by Ayres at the breachway be stricken because the comments were made while Ayres was handcuffed and a police officer stood over him with a rifle. The judge left it to the jury to decide whether the subsequent statements made by Ayres at the police station were voluntary. Ayres contends that these statements also should have been excluded as a product of an arrest made without probable cause. Ayres further argues that his statements at the police station were the unattenuated taint of his prior involuntary statements at the breachway.

We turn first to Ayres's contention that he was arrested without probable cause. A warrantless arrest is constitutionally valid if "at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had

committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Whether there is probable cause for a warrantless arrest is determined under an objective standard, not by inquiry into the officers' presumed motives. *United States* v. *McCambridge*, 551 F.2d 865, 870 (1st Cir. 1977). To sustain a warrantless arrest, the Government is not required to show that the arresting officer had "the quantum of proof necessary to convict." *United States* v. *Miller*, 589 F.2d 1117, 1128 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). Probable cause "is a practical, nontechnical conception" offering an acceptable compromise between competing societal interests in protecting citizens on the one hand from abusive interferences with privacy and unfounded charges of crime and on the other hand in recognizing the necessity to afford "fair leeway for enforcing the law in the community's protection." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

In this case, the district court concluded that the facts available to the agents, when viewed in their entirety, sufficiently provided probable cause to arrest. We agree. At the time of Ayres's arrest,[3] the state officers and federal agents operating together and in communication with each other, had observed the trailer and speedboat approach the breachway. Agents then saw the speedboat go toward the *Fiesta*, and upon its illumination, turn about and speed for shore. They saw the speedboat as it proceeded rapidly along the shore without using its running lights. By the time they reached it at the breachway, it already had been removed from the water, loaded onto the truck, and the truck and its occupants were making a hurried departure. At this point, the officers knew that the *Fiesta* had

[3] The district court ruled that Ayres's arrest occurred on the beach at the time the agents blocked the exit of the truck. The Government argues that the arrest did not occur until a few seconds later, after the truck driver fled. Because we hold that there was probable cause to arrest Ayres at the time that the truck was blocked, there is no need to consider the Government's contention.

a large quantity of marijuana aboard. Under such circumstances, the retreat of the speedboat from the marijuana-laden *Fiesta* and the obvious flight of its occupants with the truck, trailer, and speedboat were sufficient to warrant a prudent man in believing that the truck's occupants were involved in the smuggling operations.

Ayres also maintains that his statements at the police station were the unattenuated taint of his involuntary statements at the breachway. A statement made after effective *Miranda* warnings are provided may not be admissible if it is the fruit of an inadmissible prior statement. *See Brown* v. *Illinois*, 422 U.S. 590, 605 (1975). The court in *Brown* noted that several factors are relevant in determining whether a confession is a product of free will. Provision of *Miranda* warnings, although not dispositive, is an "important factor," as are "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04.

In this case, the district court ruled that it was unnecessary for the officer to hold a rifle over Ayres after he had already been handcuffed. These circumstances attending Ayres's statements at the breachway led the trial court to suppress the statements as involuntary. The court also ruled that the subsequent police actions, removing Ayres to the station, rereading him his *Miranda* rights, and then questioning him later that evening in an atmosphere when he appeared to be relaxed, fully composed, and in an open cell, did not render Ayres's statements at the police station coercive or otherwise inadmissible.

This court has held that in deciding whether to admit a confession made subsequent to an inadmissible confession, "[t]he appropriate inquiry then becomes whether the conditions that rendered the earlier confessions inadmissible carried over to invalidate the subsequent one." *Knott* v. *Howard*, 511 F.2d

1060, 1061 (1st Cir. 1975). In this case, removing Ayres from the scene where he was originally questioned, giving him his *Miranda* warnings for the third time, and interrogating him by a different officer when he was relaxed, composed, and uncoerced could well have dissipated whatever taint may have infected his prior statements at the breachway. We fail to see that Ayres's statements at the police station were inadmissible as a matter of law; we perceive no error in their admission.

Ayres also asserts that the trial judge erred in his instructions to the jury with respect to the voluntariness of Ayres's statements. The judge instructed the jury that the statements at the breachway were involuntary as a matter of law and must be disregarded, but that it was for the jury to determine whether Ayres's subsequent statements at the police station were voluntary. Ayres contends that by declaring only the statements made at the breachway involuntary as a matter of law, the court's instructions to the jury implied that the court had concluded that the statements at the police station were voluntary. This argument is not persuasive. The court informed the jury in unmistakable terms that it was for the jury to determine whether the statements at the police station were voluntary. Although the court sustained a defense objection to the testimony about the statements made by Ayres at the breachway, it specifically instructed the jury that they alone were "the sole judges" of whether Ayres's later statements were or were not voluntary. The court did not imply that the statements at the police station were voluntry. We see no error in the instruction.

III.

Each of the defendants argues that there were errors involving the Government's attempt to link Ayres with Termini and Ardizzone by demonstrating that Termini purchased from

Sears Roebuck & Co. the set of tools found in the speedboat. The defendants maintain that the belated production of certain *Brady* materials, the violations of a court witness sequestration order, and the non-production of confidential coast guard information entitle them to a new trial.

Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976), a defendant is entitled to request production of exculpatory evidence in the possession of the prosecution. In this case, a certain Sears Roebuck register receipt and a report of a failed photographic identification by a government witness, a sales clerk, were not disclosed to the defense until the middle of the trial. Government counsel explained that he was unaware of the failed photographic identification of the purchaser of the tools until the examination of the sales clerk in court. The materials, including the receipt, were thereupon given to the defendants in ample time to cross-examine the relevant witnesses. They only consisted of the single register receipt and the photographic display. The defendants have failed to show any prejudice by the production of the evidence during rather than before trial. *Cf. United States* v. *Holmes*, F.2d (4th Cir. 1983) (one day to review stack of documents eight inches thick, which included 1,000 pages of testimony, insufficient under the Jencks Act). Absent prejudice, the defendants are not entitled to a new trial because of the belated production of the *Brady* materials.

The defendants also complain of the possible violation by two government witnesses of the court's sequestration order. One involved the testimony of a Sears Roebuck employee, Triplett, who discovered when he returned to the store that he had been inaccurate in his prior testimony as to the date on which he sold the tools to Termini. When Triplett concluded his original testimony, the court informed him not to discuss the case with anyone. When he returned for further examination, he acknowledged that he was present in the store when a

co-employee and two supervisors informed him that the date of the sale was August 9th and not July 5th, as he had previously testified. The supervisors had confirmed the correct sales date with the aid of a cash register receipt first thought to be destroyed but later offered in evidence.

The other alleged violation of the sequestration order involved Sergeant Kelly. After having testified, Kelly received a telephone call from Agent Furtado informing him that he would be required to appear in court again and that Kelly was correct in the date that he had written in his report, August 9th, relating to the Sears Roebuck sale of the tools to Termini. When the defense later called Kelly as its witness, he testified that the date he had previously given, July 9th, was incorrect and that August 9th was correct. The defense interrupted Kelly's testimony with a motion for a mistrial because Kelly had violated the sequestration order by his conversation with Furtado.[4] The court, in the exercise of its discretion, denied the motion.

The court and jury were fully informed of the circumstances under which the two witnesses had discussed the case during a break in their testimony. The jury was able to weigh the credibility of the change in the testimony of the witnesses. The trial court could also assess the conduct of the witnesses and determine whether it was deliberate and malicious, or unintentional and harmless. We perceive no error in the district court's exercise of its discretion to reject the motion for mistrial.

The defendants also argue that they were denied a fair trial because the trial court did not compel coast guard officials to answer certain questions posed by defense counsel. The coast guard officers had testified to the tracking of a vessel believed

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[4] Although the Government contends the defendants made no motion for relief with respect to Triplett's conversation with his superiors, we believe the motion with respect to Kelly was couched in terms sufficiently broad to include Triplett.

to be the *Fiesta*, its approximate location on different dates, and information of the time and place where it was to be met by smaller boats. The Government asserts, and our examination of the record does not contradict the assertion, that witnesses called by the prosecution did not invoke the Classified Information Procedures Act (the Act), 18 U.S.C. app. §§ 1-16 (Supp. V 1981), during their direct or cross-examination. The defense, however, called coast guard officers as their witnesses and attempted to ascertain the source of the information for the monitoring of the *Fiesta* when the Coast Guard first detected it. When they declined to answer questions posed by the defense pertaining to the source for the information received by the Coast Guard, on the ground that it might lead to disclosure of classified information, the court first sustained objections on the ground of relevancy. The court reached this decision after conducting an *in camera* hearing. Subsequently, when the issue as to importation arose, the court reconsidered and struck the coast guard officers' testimony pertaining to the locations of the vessel at sea as in any way identifying the *Fiesta*, except testimony as to its location on August 9th. The court instructed the jury that the stricken testimony could not be considered by them. The striking of the testimony obviously benefitted the defendants and we believe that this ruling and the curative charge provided the defendants with an adequate remedy. *See United States* v. *Porter*, 701 F.2d 1158, 1162 (6th Cir. 1983) (Whenever defendant is prevented by order from causing disclosure of classified information, the court may in the interests of justice order "such other action, in lieu of dismissing the indictment . . .," as it determines appropriate).

IV.

The defendants claim that they are entitled to a new trial because on two occasions some of the jurors inadvertently saw

one or more of the defendants in handcuffs while they were outside the courtroom. The Supreme Court noted in *Illinois* v. *Allen*, 397 U.S. 337 (1970), that "no person should be tried while shackled and gagged except as a last resort." *Id.* at 344. This court has recently held that it is unconstitutional to confine a defendant at trial to a "prisoner's dock" in the absence of special security needs. *See Young* v. *Callahan*, 700 F.2d 32, 37 (1st Cir.), *cert. denied*, 52 U.S.L.W. 3266 (U.S. Oct. 4, 1983) (No. 82-1829).

These cases, which serve to guarantee that a defendant's presumption of innocence will not be eroded at trial by the presence of physical restraint, deal with problems quite different from the one raised in this case. The defendants in the case *sub judice* were not shackled and gagged in the courtroom; they were handcuffed while transported to and from the courthouse. The jurors were not repeatedly reminded of the defendants' confinement; the jurors had only an inadvertent quick glimpse once or twice of the defendants in handcuffs out of court. This evanescent image of the defendants would hardly dilute their presumption of innocence. In *Dupont* v. *Hall*, 555 F.2d 15 (1st Cir. 1977), this court held that a defendant was not entitled to a mistrial when a jury engaged in its final deliberations accidentally saw the defendant in custody. Care should be taken whenever reasonably possible to prevent the jurors from viewing a defendant handcuffed while the defendant is on trial. In the absence of a showing of prejudice, however, a fleeting glance by jurors of a defendant outside the courtroom in handcuffs does not justify a new trial.

V.

In summary, the enforcement agents had probable cause to arrest Ayres, and the district court committed no error in admitting his statements at the police station, despite the exclu-

sion of his earlier statements at the breachway. Ayres's statements at the police station provided ample evidence to establish his relationship to the *Fiesta* smuggling operation. Furthermore, none of the errors alleged by the defendants with regard to the identification of Termini as the purchaser of the tools requires a reversal of the defendants' convictions. The district court also did not err in refusing to order a mistrial upon discovery that some of the jurors had an out-of-court glimpse of the defendants in handcuffs.

The convictions are affirmed.

No. 83-1559 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT M. AYRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a comprehensive incriminating statement given by petitioner after he had repeatedly received *Miranda* warnings should have been suppressed because petitioner had previously made a brief inculpatory statement that the district court found inadmissible, when the courts below ruled that the second statement was not the causal product of the first.

2. Whether the statement should have been suppressed on the ground that there was no probable cause to arrest petitioner.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a -22a) is reported at 725 F.2d 806.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1984. The petition for a writ of certiorari was filed on March 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a trial before a jury in the United States District Court for the District of Rhode Island, petitioner was convicted of conspiracy to possess 8,785 pounds of marijuana

with intent to distribute it, in violation of 21 U.S.C. 846.[1] He was sentenced to imprisonment for six years. The court of appeals affirmed (Pet. App. 10a-22a).

1. In July and August 1982, law enforcement authorities conducted surveillance of the sailing vessel *Fiesta,* off the shore of Rhode Island, because they had received information that it was involved in a marijuana smuggling operation. On August 9, the Coast Guard boarded the *Fiesta* and discovered 221 bales of marijuana weighing 8,785 pounds. While the boarding was in progress, officers on land who were participating in the investigation observed a truck towing a speedboat toward a beach. An officer subsequently saw the speedboat go out to sea. Pet. App. 12a-13a.

While the speedboat was heading away from shore, a Coast Guard ship illuminated the *Fiesta* to aid the boarding operation. Officers watching the speedboat saw that when the *Fiesta* was illuminated, the speedboat quickly turned back toward shore. It travelled at a high speed with its running lights extinguished. Pet. App. 13a. There were no other comparable boats in the area at that time (I C.A. App. 277).

An officer on land was apprised of both the speedboat's behavior and the discovery of marijuana on the *Fiesta.* He instructed other officers to proceed to the beach from which the speedboat had been launched. When the officers did so, they saw that the boat had already been lifted from the water and reattached to the truck and that the truck was departing. Petitioner was a passenger in the truck. The

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[1]Petitioner and two co-defendants were charged in an eight-count indictment. Petitioner was named in four counts; he was acquitted on the other three charges. Co-defendants Termini and Ardizzone were each charged in six counts and convicted on four. Each was sentenced to a fine of $15,000 and to concurrent sentences of five, eight, eight, and one year's imprisonment. I C.A. App. 4, 7-8, 14-15.

officers blocked the truck's path, forcing it to stop. When they did so, the driver fled, but petitioner was apprehended, handcuffed and ordered to lie down. Officer Phelps, who was holding a rifle at the time, gave petitioner the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Pet. App. 13a, 15a-16a; I C.A. App. 255, 343. Petitioner stated that he understood his rights (I C.A. App. 342).

Officer Phelps testified as follows about his ensuing conversation with petitioner (I C.A. App. 242):

> I said, where's the dope, and he said you're a day early, this was only a surveillance run. And I said who's the driver of the truck.
>
> * * * * *
>
> He told me that the name of the person was Freddie. I asked for the last name, and he told me that he didn't know the last name, that nobody used last names, and if they did, they would be phony names.

Another officer then transported petitioner to the stationhouse, giving him *Miranda* warnings en route. At the stationhouse, petitioner was placed in a holding cell and again given *Miranda* warnings. A federal law enforcement officer then questioned petitioner as follows (V C.A. App. 512-513):

> I told him to start from the beginning and tell me how he got involved in the smuggling operation. He stated that at a previous time he had worked for an individual named Robert Berzon in Florida, that he had done packaging and inventory work for him in a smuggling operation in south Florida. He stated that Berzon had moved the smuggling operation to New England because of law enforcement pressure in the south Florida area; that as far as this particular operation went,

> he had called a voice beeper and left a message. Following that, an individual named El got in touch with him, El told him to go to the Newport Creamery in Wakefield. [Petitioner] stated that he went to that location approximately three days before the arrest, he was met by an individual named Chipper, he stated Chipper took him to the house in Hope Valley on Woody Hill Road, and that while he was at that residence he worked on the power trim of the [speedboat]. He stated that he never left the house until the night of August 9th, and when he did leave he left with Fred Baker to meet the Fiesta. He also stated that all the goods that were in the boat as far as the provisions go were purchased by Chipper. He also stated that Robert Berzon lived in some luxury apartments on Boston harbor, the name of Harbor Towers was suggested to him and he stated that he thought that was where Berzon lived. He also stated that Berzon owned a Chevy blazer and that he had radio equipment inside the blazer, and that's how the smuggling operation was being controlled through that radio equipment in the blazer.

2. Petitioner moved to suppress his statements. The district court ruled that the officers' action in blocking the truck in which petitioner was a passenger was an arrest, not a stop, but that it was supported by probable cause and was therefore lawful. The district court accordingly concluded that petitioner's statements were not the fruit of a Fourth Amendment violation. Pet. App. 4a-5a.

The district court then ruled that petitioner's first statement, which he made to Officer Phelps on the beach, should be excluded from evidence; the court reasoned that although petitioner had received *Miranda* warnings, the circumstances of the questioning precluded "a knowing and voluntary waiver of his rights" (Pet. App. 6a).

But the district court rejected petitioner's contention that the statements he subsequently made at the stationhouse should also be suppressed. The court explained (Pet. App. 8a-9a):

> [Petitioner's] initial statement, "you are a day early. This is only a surveillance run[,]" is not equivalent to his later admission as to how he allegedly became involved in drug smuggling. * * * [T]his case did not involve the interrogation of the defendant by an agent, "a[r]med with the defendant's earlier admissions." [Citation omitted]. It might be argued that the factual information discovered during the interrogation of [petitioner], in the Charlestown Police Station was the fruit of the poisonous tree of the earlier unlawful interrogation because both conversations were related to an alleged drug smuggling operation. The court rejects this contention. It simply cannot be said that [petitioner's] subsequent statements about his possible involvement with drug smuggling activities were the tainted product of his initial admission.

The district court also rejected petitioner's contention that the events on the beach rendered invalid his subsequent waiver of his *Miranda* rights at the stationhouse. The court explained that at the time petitioner made his stationhouse confession, he had not been in custody for a long period and had not been subjected to prolonged interrogation. In addition, the court reasoned, petitioner had been moved to a different location, had received additional sets of *Miranda* warnings, and was questioned by a different officer. Pet. App. 7a-8a. The district court found that "[t]his broke the chain of events between his initial involuntary statement and his subsequent admissions in the police station" (*id.* at 8a). The district court instructed the jury to determine whether petitioner's subsequent statements were voluntary and to disregard them if they were not (see *id.* at 17a).

3. The court of appeals affirmed petitioner's conviction. The court did not reach the question whether the initial blocking of the truck was a stop or an arrest (see Pet. App. 15a n.3) because it found that the officers had probable cause (*id.* at 15a-16a). The court of appeals also upheld the district court's rejection of petitioner's contention that his stationhouse confession should be suppressed as the "fruit" of the statement he made on the beach. The court of appeals recognized that "[a] statement made after effective *Miranda* warnings are provided may not be admissible if it is the fruit of an inadmissible prior statement" (*id.* at 16a). But the court ruled (*id.* at 17a): "In this case, removing [petitioner] from the scene where he was originally questioned, giving him his *Miranda* warnings for the third time, and interrogating him by a different officer when he was relaxed, composed, and uncoerced could well have dissipated whatever taint may have infected his prior statements * * *. We fail to see that [petitioner's] statements at the police station were inadmissible as a matter of law; we perceive no error in their admission."

ARGUMENT

1. Petitioner contends that the statement he made at the stationhouse was inadmissible. Petitioner made that statement after he had repeatedly been given *Miranda* warnings and had made what appears to be a voluntary and intelligent waiver of his rights. There is no evidence that the officers who questioned petitioner at the stationhouse used intimidating or oppressive tactics.

Petitioner nevertheless contends (Pet. 6-7) that his stationhouse confession should have been suppressed because it was "tainted" (*id.* at 6) by his earlier statement at the arrest scene, a statement that the district court ruled was inadmissible. Petitioner may mean one of two things by this. He may mean that the circumstances present at the

arrest scene — circumstances that the district court considered too coercive to permit a valid waiver of *Miranda* rights[2] — persisted and rendered the stationhouse environment so coercive that the waiver of *Miranda* rights that petitioner gave at the stationhouse was invalid. This is what was found to have occurred in the cases petitioner cites (Pet. i, 6) — *Westover* v. *United States*, a case decided with *Miranda*, and *Clewis* v. *Texas*, 386 U.S. 707 (1967). Alternatively, petitioner may mean that while his stationhouse confession was itself voluntary and was preceded by a valid waiver of *Miranda* rights, it should have been suppressed because it was the "fruit" of his earlier inadmissible confession.[3]

However petitioner's contention is interpreted, it does not merit this Court's review.

a. Both courts below ruled that the conditions that were present at the first interrogation of petitioner did not persist and affect the stationhouse environment, and their ruling was clearly correct. The coercion that the district court perceived in the interrogation that occurred at the scene of the arrest resulted entirely from the fact that petitioner was handcuffed and lying face down and that the officer questioning him was holding a weapon. See Pet. App. 6a. All of

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[2]Petitioner asserts (Pet.5) that the district court considered his first statement to have been compelled, but the reason the court gave for suppressing the statement (Pet.App. 6a) was only that it was obtained in circumstances that rendered petitioner's waiver of *Miranda* rights invalid. See generally *Garner* v. *United States*, 424 U.S. 648, 654 n.9 (1976).

[3]Justice Harlan distinguished between two somewhat analogous bases for urging the suppression of a statement in his separate opinion in *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968). See also *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 1-2 & n.1 (O'Connor, J., concurring in part and dissenting in part); *McMann* v. *Richardson*, 397 U.S. 759, 769 (1970).

these conditions had been removed when petitioner was questioned at the stationhouse; whatever physical force or threat petitioner experienced at the arrest scene was wholly absent at the stationhouse.

Nor is there any evidence that petitioner had any reason to believe that these conditions would recur. The stationhouse interrogation appears to have been of relatively short duration and there is no suggestion that it was in any way menacing. Petitioner received *Miranda* warnings twice shortly before he was questioned at the stationhouse. There is, accordingly, no reason for this Court to question the lower courts' determination that Officer Phelps's actions at the arrest scene did not impair petitioner's ability to choose to remain silent at the stationhouse.[4]

b. The findings of the courts below also preclude the analytically distinct contention that petitioner's second incriminating statement, while itself voluntary and obtained in circumstances that comply with *Miranda*, should be suppressed because it was the "fruit" of his prior statement. Whatever the proper scope of a "fruits" doctrine in this area, it is entirely clear that petitioner's subsequent statement cannot be suppressed if it was not the causal product of his earlier statement. That is, petitioner cannot claim that his stationhouse confession is an inadmissible "fruit" unless he can show that it was "impelled by" or "induce[d]" by his prior statement (*Harrison* v. *United States*, 392 U.S. 219, 224-225 (1968)); petitioner's attempt to invoke a "fruits" doctrine must " 'begin with the [showing] that the

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[4]In both *Clewis* and *Westover*, the defendants were subjected to prolonged custodial interrogation under coercive circumstances before they confessed. Nothing occurred before the confession in issue that dispelled the coercive pressures of the custodial surroundings. See 386 U.S. at 709-710; 384 U.S. at 494-496. Here, the circumstances that the district court considered coercive were removed before petitioner gave his confession at the stationhouse.

challenged evidence is *in some sense* the product of' " the statement that was found to be inadmissible. *Nix* v. *Williams,* No. 82-1651 (June 11, 1984), slip op. 11, quoting and adding emphasis to *United States* v. *Crews,* 445 U.S. 463, 471 (1980). See, *e.g., Kastigar* v. *United States,* 406 U.S. 441, 453-454 (1972); *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79 (1964).

The courts below concluded that petitioner failed to show that his second statement was the causal product of the first. See Pet. App. 8a-9a ("It simply cannot be said that [petitioner's] subsequent statements about his possible involvement with drug smuggling activities were the tainted product of his initial admission."); *id.* at 17a. There is no reason for this Court to reassess their resolution of this factual issue. Petitioner's first statement — "you are a day early[,] this is only a surveillance run" — was brief and offhand. Moreover, it was not literally a confession; it incriminated petitioner only indirectly, by confirming instead of denying the premise of Officer Phelps's question "where's the dope?" In addition, there is no evidence that the agents who questioned petitioner at the stationhouse reminded him of his earlier statement in an effort to convince him that he had nothing more to lose by speaking fully.

Thus, it is entirely possible that petitioner did not even recall his previous, brief statement when he was questioned at the stationhouse. Even if he did recall it, he may well not have realized that it was significantly incriminating; a nonlawyer will not always recognize the damaging use that can be made of such informal remarks. And even if petitioner realized that he had made a damaging statement, there is no evidence that his having made the previous statement affected his willingness to speak further; he may simply have been disposed to cooperate with the authorities

throughout.[5] In sum, there was ample basis for the lower courts' concurrent determination that petitioner's station-house confession was not the product of his earlier statement. Accordingly, petitioner cannot seek the suppression of his second statement on the ground that it was a "fruit" of the first.[6]

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[5]Petitioner is incorrect in asserting (Pet. 7) that the decision below conflicts with decisions of other courts of appeals. In *United States* v. *Lee*, 699 F.2d 466, 468-469 (9th Cir. 1982), *Alberti* v. *Estelle*, 524 F.2d 1265, 1268 (5th Cir. 1975), and *Randall* v. *Estelle*, 492 F.2d 118, 120 (5th Cir. 1974), the courts found that the statements in issue were either the product of a prior, inadmissible statement or the product of the coercive circumstances that caused the prior statement to be suppressed. Here, of course, the findings of the courts below were to the contrary. In neither *Lee*, *Alberti*, nor *Randall* did the facts resemble those of this case. *Stumes* v. *Solem*, 671 F.2d 1150 (8th Cir. 1982), rev'd, No. 81-2149 (Feb. 29, 1984), and *United States* v. *Tucker*, 610 F.2d 1007 (2d Cir. 1979), did not involve any issue comparable to those presented here: *Stumes* concerned the contours of the prophylactic rule established by *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and *Tucker* involved statements that were the alleged fruits of a Fourth Amendment violation.

[6]In *Oregon* v. *Elstad*, cert. granted, No. 83-773 (Mar. 5, 1984), this Court is considering the extent to which an otherwise admissible statement must be excluded as the fruit of a statement obtained in violation of *Miranda*. See also *Quarles*, slip op. 1-2 n.1, 6-14 (O'Connor, J., concurring in part and dissenting in part). (We have sent a copy of the Brief for the United States as Amicus Curiae in *Elstad* to counsel for petitioner.) But however the Court resolves the question presented in *Elstad*, this case will not merit review.

Even if the Court in *Elstad* adopts the position that *every* statement that is the product of a prior inadmissible statement must be suppressed (but see *United States* v. *Bayer*, 331 U.S. 532, 540-541 (1947)), petitioner would not be entitled to relief. That is because, as we explained in text, the courts below determined that petitioner failed to satisfy the threshold test for invoking any "fruits" doctrine; he has not shown a causal connection between the inadmissible evidence and the evidence he seeks to have excluded.

2. Petitioner further contends (Pet. 7-9) that the initial detention of the truck in which he was riding was not supported by probable cause. We believe, contrary to the district court, that the initial police action in blocking the truck was a stop that required only reasonable suspicion (see *Terry* v. *Ohio*, 392 U.S. 1 (1968)), at least up until the point when the driver fled, thus unquestionably giving the officers probable cause.[7] Furthermore, we doubt that petitioner would have been entitled to have his stationhouse confession suppressed even if the detention of the truck were illegal. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 106-110 (1980).

But in any event, the courts below were plainly correct in concluding that the officers had probable cause when they first blocked the truck. Contrary to petitioner's assertion, their actions were not based solely on petitioner's "presence at the scene of a crime and/or association with criminals" (Pet. 8): the operators of the speedboat and the truck behaved in precisely the way that would be expected of persons engaged in assisting the marijuana smuggling operation that the officers knew was in progress. As the court of appeals explained (Pet. App. 15a-16a (footnote omitted)):

> At the time of [petitioner's] arrest, the state officers and federal agents operating together and in communication with each other, had observed the trailer and speedboat approach the breachway. Agents then saw the speedboat go toward the *Fiesta*, and upon its

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[7]The district court relied on *United States* v. *Ceballos*, 654 F.2d 177 (2d Cir. 1981), in concluding that the initial blocking of the truck was an arrest instead of a stop (Pet. App. 3a-4a). While we do not agree with *Ceballos*, we note that this case is easily distinguishable. In this case, unlike *Ceballos*, the officers merely blocked the truck; there is no showing that they approached with guns drawn (see I C.A. App. 257). The driver fled "about simultaneously with" the blocking of the truck (*ibid.*).

illumination, turn about and speed for shore. They saw the speedboat as it proceeded rapidly along the shore without using its running lights. By the time they reached it at the breachway, it already had been removed from the water, loaded onto the truck, and the truck and its occupants were making a hurried departure. At this point, the officers knew that the *Fiesta* had a large quantity of marijuana aboard. Under such circumstances, the retreat of the speedboat from the marijuana-laden *Fiesta* and the obvious flight of its occupants with the truck, trailer, and speedboat were sufficient to warrant a prudent man in believing that the truck's occupants were involved in the smuggling operations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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